

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*,)

)

Plaintiffs,)

)

v.)

Case No. 4:05-cv-00329-GKF-PJC

)

TYSON FOODS, INC., *et al.*,)

)

Defendants.)

DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT DISMISSING
COUNTS 1, 2, 3, 4, 5, 6 AND 10 DUE TO LACK OF DEFENDANT-SPECIFIC
CAUSATION AND DISMISSING CLAIMS OF JOINT AND SEVERAL LIABILITY
UNDER COUNTS 4, 6 AND 10

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The undersigned Defendants respectfully move for an order of summary judgment on Plaintiffs' CERCLA claims (Counts 1 and 2), RCRA claim (Count 3), federal common law nuisance claim (Count 5), and state common law nuisance, trespass and unjust enrichment claims (Counts 4, 6 and 10) as Plaintiffs lack evidence sufficient to meet their burden to prove causation with respect to each of the Defendants. In the alternative, Plaintiffs' assertion of joint and several liability pursuant to their state common law nuisance, trespass and unjust enrichment claims (Counts 4, 6 and 10) must fail as a matter of law because the undisputed facts establish that the State of Oklahoma has contributed to the environmental injuries alleged in Plaintiffs' Second Amended Complaint ("SAC"), Dkt. No. 1215 (July 16, 2007). As a result, the doctrine of joint and several liability is unavailable to Plaintiffs with respect to these state law claims.

INTRODUCTION

In this action, Plaintiffs seek to recover damages for environmental injuries allegedly caused by Defendants' release of phosphorus compounds and bacteria¹ in the lands and waters in the Illinois River Watershed ("IRW"). Plaintiffs allege that these releases generally have degraded the environment of the IRW, and specifically that excess phosphorus concentrations have promoted the growth of algae in Lake Tenkiller and the Illinois River. *See* SAC ¶¶56, 59-

¹ Plaintiffs' expert Dr. Berton Fisher has admitted that Plaintiffs have failed to identify any constituents of concern in the IRW other than phosphorus and bacteria. *See* Fisher II Dep. at 451:7-11, 516:9-17, 615:4-616:19 (Ex. 1) ("[T]he only contaminants of concern [to Plaintiffs] in the [IRW] are phosphorus and bacteria."). Plaintiffs' retained expert Dr. Todd King has similarly agreed that Plaintiffs did not consider other constituents of concern alleged in the SAC (such as heavy metals, arsenic, or estradiol) in evaluating remedies in this case. *See* King Dep. at 69:20-71:3, 81:21-25 (Ex. 2). However, Plaintiffs refuse to acknowledge these admissions regarding the evidence in this case, and insist that they have asserted a viable CERCLA claim addressing "phosphorus, nitrogen, arsenic, zinc and copper (and compounds thereof)." Dkt. No. 1913 at 1-2, ¶4 (Mar. 9, 2009). But, Plaintiffs' contention is not supported by the evidence and contrary to their prior admissions. *See* Dkt. No. 1925 at 5-7; Dkt. No. 1872 at 6-8 (Feb. 18, 2009); *see also Missouri Housing Development Com'n v. Brice*, 919 F.2d 1306, 1314 (8th Cir. 1990) (binding party by prior admission). Accordingly, Defendants limit their discussion in this brief to phosphorus compounds and bacteria, but note that the legal analysis in this memo would remain the same regardless of the constituents of concern discussed.

60. Plaintiffs allege that Defendants are liable for cost recovery and natural resource damages under CERCLA (Counts 1 and 2), and that this Court should issue an injunction under RCRA prohibiting the use of poultry litter as a natural fertilizer (Count 3). *See id.* at ¶¶69-88, 89-96. Plaintiffs also assert a claim of federal common law nuisance (Count 5), and state common law claims of nuisance and nuisance *per se* (Count 4), trespass (Count 6) and unjust enrichment (Count 10). *See id.* at ¶¶97-126, 139-146. Plaintiffs have requested that this Court assign damages on a joint and several basis. *See id.* at ¶¶29, 76, 88, 105, 116, 124.

The Court has likely noted that Plaintiffs have treated Defendants as a single undifferentiated mass in this case. For example, all of the SAC's sweeping allegations relate to all Defendants, despite the fact that the SAC does not attempt to create a defendant class, but rather seeks to recover from each Defendant individually based on the same allegations. *See id.* at ¶¶6-20. In keeping with this approach, all of Plaintiffs' evidence of causation and injury in this case is based on the aggregate alleged activities and impact of all Defendants. Plaintiffs have not gathered evidence that any particular Defendant has caused any of the injuries alleged in the SAC. *See infra* at 16-21; *see also* Undisputed Facts ¶¶14-18; Joint Appendix of Defendant-Specific Facts at ¶¶ I.(A)-(D), III.(A); IV.(B)-(C); V.(B)-(D).²

As just one example, Plaintiffs' experts have opined that 59% of all the phosphorus compounds that were transported to Lake Tenkiller from 2003 to the present originated from "poultry litter." Plaintiffs allege that someone applied that poultry litter to some lands somewhere in the IRW. But neither Plaintiffs nor their experts have attempted to identify those

² For the convenience of the Court, Defendants have attached the Joint Appendix of Defendant-Specific Facts ("Joint Appendix") as Addendum A hereto. Although the Joint Appendix does not add any fact or evidence that is not discussed herein, the addendum separately sets forth the relevant facts and evidence with respect to each of the individual undersigned Defendants for the Court's consideration in connection with the present motion.

particular land-application events or to determine the extent to which, if at all, each individual Defendant contributed to the phosphorus load they seek to assign generally to poultry litter. *See* Ex. 3 at 92-93. In other words, Plaintiffs have not provided evidence purporting to establish a causal link between each Defendant and the injuries and damages alleged.

Similarly, Plaintiffs' experts have repeatedly admitted that Plaintiffs have not traced a single injury or a single instance of alleged "contamination" or "pollution" of Lake Tenkiller, the Illinois River or its tributaries to a specific Defendant, to one or more specific fields where litter was used as a fertilizer, or to poultry farmers operating under contract with a specific Defendant ("Contract Growers"). *See* Undisputed Facts ¶¶14-18; *see, e.g.*, Olsen II Dep. at 46:24-47:25 (Ex. 4); Fisher II Dep. at 74:17-25, 80:14-23, 82:9-17, 86:18-87:4 (Ex. 1). Instead, Plaintiffs have presented what amounts to an "industry case" in which its proof of "causation" is limited to expert testimony that the commodity "poultry litter" has generally caused harm. In the absence of a defendant class, such generalized proof is insufficient to satisfy the specific causation element of Plaintiffs' CERCLA, RCRA, federal common law nuisance and state common law nuisance, trespass and unjust enrichment claims.³

Although this defect is fatal to Counts 1, 2, 3, 4, 5, 6 and 10 of the SAC, Counts 4, 6 and 10 would fail even if Plaintiffs had gathered Defendant-specific proof of causation and injury. Liability under those claims can only be several in this case (not joint as Plaintiffs request), yet Plaintiffs have failed to apportion damages among the Defendants.⁴ While Plaintiffs allege that

³ As detailed in a separate motion, Plaintiffs' state statutory claims (Counts 7 & 8) require dismissal for the related reason that Plaintiffs have failed to identify record evidence establishing any specific violations of the statutes in question. *See Defs.' Joint Mot. for Summary Judgment on Counts 7 & 8 of the Second Amended Complaint*, Dkt. No. 2057 at 24-25 (May 18, 2009).

⁴ Although Plaintiffs may attempt to conflate the principles, joint and several liability is not a substitute for individualized proof of causation. In non-strict-liability causes of action such as Plaintiffs' state common law claims, a defendant cannot be liable unless he caused or contributed

Defendants are jointly and severally liable under Plaintiffs' common law nuisance and trespass claims, *see* SAC ¶¶29, 76, 88, 105, 124, joint and several liability is not available to Plaintiffs as a matter of law because Plaintiffs have contributed to the very "contamination" or "pollution" for which they seek to assess damages against Defendants. The undisputed facts show that Plaintiffs are responsible for the release of phosphorus and bacteria⁵ onto the lands and into the waters of the IRW. *See* Undisputed Facts ¶¶19-57. These releases have occurred over decades and are the result of both negligent and intentional conduct by the State: (i) in the operation of State-owned parks, roads, and lands in the IRW, (ii) in permitting the discharge of human sewage directly into the waters at issue in this litigation, (iii) in permitting the spread of biosolids (i.e., human sewage sludge) by municipalities onto lands in the IRW, and (iv) in issuing farm management plans approving and permitting the very land applications of poultry litter that the State now alleges are the bases for Defendants' liability. Joint and several liability is not available to a plaintiff who is also at fault for or has contributed to the injuries or damages alleged. Because the State is a contributor and is partially at fault for the environmental injuries alleged, Defendants are entitled to judgment as a matter of law dismissing Plaintiffs' claims for joint and several liability with respect to their state common law claims.

to the harm alleged. *See infra* at 16-21. If liability is established as to two or more defendants, the court must consider the plaintiff's fault to determine whether liability is several or joint and several. If the plaintiff contributed to the alleged harm, liability is several, and the plaintiff must be prepared to apportion damages. *See Laubach v. Morgan*, 588 P.2d 1071 (1978). If the plaintiff is "blame free," liability is joint and several, and apportionment is not required. *See Boyles v. Oklahoma Natural Gas Co.*, 619 P.2d 613 (1980). In this case, although apportionment is required for Plaintiffs' state common law claims, Plaintiffs have failed to produce any evidence to apportion damages among the numerous Defendants. *See infra* at 21-25.

⁵ Along with various heavy metals and other constituents associated with human sewage. *See* Ex. 5; *see also* Ex. 6.

STATEMENT OF UNDISPUTED MATERIAL FACTS

A. Plaintiffs' "Industry" Case and the Lack of Defendant-Specific Proof of Causation

1. Plaintiffs named thirteen separate companies as separate defendants in this case. Plaintiffs did not seek to certify a class of defendants. *See* SAC ¶¶6-18.

2. Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc. are part of the same corporate family, but they are separate entities with different facilities, operations, and activities. These companies are not homogenous in their makeup or actions. *See* SAC ¶¶6-9; Hudson Dep. at 28:24-29:2, 29:11-30:13, 37:5-18, 38:14-40:9, 41:9-43:4, 43:16-46:14, 49:12-50:2, 50:15-51:17, 60:15-61:21, 63:8-64:6 (Ex. 7).

3. Defendants Cargill, Inc. and Cargill Turkey Production, LLC are part of the same corporate family, but they are separate entities with different facilities, operations, and activities. These companies are not homogenous in their makeup or actions. *See* SAC ¶¶12-13.

4. Defendants George's, Inc. and George's Farms, Inc. are part of the same corporate family, but they are separate entities with different facilities, operations, and activities. These companies are not homogenous in their makeup or actions. *See* SAC ¶¶14-15.

5. Defendants Cal-Maine Foods, Inc. and Cal-Maine Farms, Inc. are part of the same corporate family, but they are separate entities with different facilities, operations, and activities. These companies are not homogenous in their makeup or actions. *See* SAC ¶¶10-11.

6. To the extent that the aforementioned individual Defendants are in the same corporate family, they do not compete in the marketplace against other members of the same corporate family. Otherwise, all of the companies named as Defendants in this lawsuit are competitors with one another.

7. Defendants compete with each other for raw materials, labor in the form of company employees and opportunities to contract with independent Contract Growers,

customers, capital, and other business opportunities. The Defendants are not homogenous in their makeup or actions.

8. Other than in the instances where multiple Defendants are in the same corporate family, the operations and assets of the numerous Defendants in this case are separately run and owned. *See* SAC ¶¶6-18.

9. Individual Defendants separately contract with different independent non-party farmers (“Contract Growers” or “Growers”) to raise poultry in the IRW on farms owned by these independent contractors. The identity and number of Contract Growers that choose to associate with any particular Defendant varies over time. *See, e.g.*, Exs. 8-13.

10. Contract Growers operate different farms that are in different, unique locations in the IRW. Each of these farm locations has different characteristics including differing size, topography, and distance from streams or other water bodies. *See, e.g.*, Exs. 8-13; Exs. 14-21.

11. Some Defendants currently do not contract, or have never contracted, with any Contract Growers in the IRW. *See, e.g.*, Dkt. No. 1775 at 6; Joint Appendix at ¶¶ II(A); IV(A); V(A).

12. “Poultry litter consists of fecal excrement and ... bedding material ... and other components such as feathers and soil. Wood shavings, sawdust, and soybean, peanut, or rice hulls are all common” bedding materials. Ex. 22.

13. Plaintiffs’ causation experts claim that phosphorus compounds⁶ and bacteria from the land application of poultry litter in the IRW has contributed to what they allege to be

⁶ For ease of reference, many of the witnesses and documents in this case refer to the orthophosphates that make up natural fertilizers by the short-hand abbreviations of “phosphorus” or “P.” However, poultry litter does not actually contain elemental phosphorus (designated as “P” on the periodic table of the elements), which is a highly reactive and dangerous chemical that burns when exposed to the air and thus exists only when manufactured in chemical plants. *See* Dkt. No. 1925 at 1-5 (Mar. 23, 2009); Dkt. No. 1872 at 2 ¶¶7-8, 8-12 (Feb. 18, 2009).

excessive amounts of phosphorus compounds and bacteria in recreational water bodies in the IRW such as Lake Tenkiller and the Illinois River. *See, e.g.*, Ex. 23 at 22 ¶¶56; Ex. 24 at 15-18 ¶¶4-5.

14. Plaintiffs' causation experts have not, however, attempted to link phosphorus compounds and bacteria in groundwater or recreational water bodies in the IRW to any particular Defendant, to any particular Contract Grower who contracts with any particular Defendant, or to any particular instance where poultry litter was applied to the land. *See* Fisher II Dep. at 80:14-82:17, 86:18-88:2 (Ex. 1); Engel Dep. at 457:9-15 (Ex. 25); *see also* Joint Appendix at ¶¶ I.(A)-(D), III.(A); IV.(B)-(C); V.(B)-(D).

15. Plaintiffs' causation experts have not attempted to link phosphorus compounds and bacteria in groundwater or recreational water bodies in the IRW to any particular instance where poultry litter was applied to the land by non-party farmers or ranchers that do not contract with Defendants.

16. Plaintiffs' geologist admits that he and Plaintiffs' expert team could not identify a single Contract Grower who contracts with any Defendant as the source for phosphorus compounds or bacteria found in a stream, river, or lake in the IRW or in groundwater beneath the IRW. *See* Fisher II Dep. at 80:14-82:17, 86:18-88:2 (Ex. 1).

17. Plaintiffs' "fingerprinting" or "source tracking" experts also admit that their alleged "fingerprints" or "biomarkers" do not allow them to link any specific instances of contamination of groundwater or surface water traced back to the land application of poultry litter generated on a farm operating under contract with any specific Defendant. *See* Olsen II Dep. at 46:24-47:25 (Ex. 4); *see also* Harwood Dep. at 168:25-169:18 (Ex. 26).

18. Plaintiffs' watershed modeler claims to have determined the relative contribution of the entire poultry industry to the total annual load of phosphorus compounds that enter Lake Tenkiller, but he has not attempted to confirm or quantify the contribution of individual Defendants to the alleged contamination. *See* Engel Dep. at 457:9-15 (Ex. 25). Thus, Plaintiffs claim to have evidence to show the amount of phosphorus compounds that *all* Defendants jointly contribute to Lake Tenkiller's waters, but have no evidence to show the contribution of any particular Defendant. *Id.* Thus, the contribution of any particular Defendant could be zero.

B. The State of Oklahoma's Authorization and Use of Poultry Litter as a Fertilizer in the IRW

19. Poultry litter is an effective fertilizer, for which there is an active market in the IRW. *See* Ex. 27 ("The Oklahoma Litter Market website serves as a communication link for buyers, sellers and service providers of poultry litter."); Ex. 28 (providing a "Fertilizer Value Calculator" to "calculate [the] value of nutrients in [poultry] litter"); Ex. 22; Ex. 29 at 1, 2; Ex. 30 at 1; Ex. 31 at 31:11-14, 540:19-541:4, 1764:23-1768:9 ("P.I.T."); Peach Dep. at 45:7-45:10, 126:22-128:9, 136:17-137:23 (Ex. 32); Ex. 33 at 7-8; *see also* 2 O.S. § 10-9.1, *et seq.*; O.A.C. § 35:17-5-1 (enacting poultry litter laws and regulations to "assist in ensuring beneficial use of poultry waste"); Peach Dep. at 79:3-79:9 ("Oklahoma Conservation Commission teach[es] people how to ... apply ... and use litter in the IRW") (Ex. 32).

20. The State of Oklahoma authorizes and comprehensively regulates every application of poultry litter in the state. *See* 2 O.S. § 10-9.1 *et seq.*; 2 O.S. § 10-9.16 *et seq.*; 2 O.S. § 20-40, *et seq.*; O.A.C. § 35:17-5-1, *et seq.*; O.A.C. § 35:17-7-1, *et seq.*

21. Every application of poultry litter must be performed by a registered poultry farmer (Grower) or certified applicator consistent with a nutrient management plan (NMP) and/or animal waste management plan (AWMP) approved by agent(s) for the State of Oklahoma.

The state-approved poultry litter management plans are specifically tailored to the each parcel of land and dictate the time, method, location, and amount of poultry litter that may be applied. *See* 2 O.S. §§ 10-9.7, 20-48; 2 O.S. § 10.9-16, *et seq.*; O.A.C. § 35:17-5-1, *et seq.*; O.A.C. § 35:17-7-1, *et seq.*; *see, e.g.*, Exs. 14-21; *see also, e.g.*, Parrish Dep. at 71:4-79:20, 235:21-236:3 (Ex. 34); Gunter Dep. at 74:6-12 (Ex. 35); Fisher II Dep. at 470:8-471:8, 472:15-473:7 (Ex. 1).⁷

22. Growers own the poultry litter generated on their farms. *See* P.I.T. at 2021:23-2022:2, 2045:6-18, 2048:14-2049:6 (Ex. 31); Ex. 36 at Hunton Aff. ¶¶4, 8, Pigeon Aff. ¶¶6-7, Reed Aff. ¶¶7-8, 11, Saunders Aff. ¶¶5-6; Exs. 8-13; *see, e.g.*, Ex. 10 at PFIRWP-024054 ¶II(H); Ex. 11 at SIM AG 37099 ¶7.

23. Growers sell, distribute, store or use their poultry litter at their own discretion, subject to applicable state and federal laws and regulations. *See* P.I.T. at 2024:25-2025:15, 2031:24-25, 2032:12-25, 2045:6-2046:9, 2052:21-2053:14 (Ex. 31); Littlefield Dep. at 53:2-9 (Ex. 37); Ex. 36 at Hunton Aff. ¶¶4, 8, Pigeon Aff. ¶¶6-7, Reed Aff. ¶¶7-8, Saunders Aff. ¶¶5-6.

24. Approximately one-half of all poultry litter used as fertilizer in the IRW is land-applied by non-party farmers and ranchers who are not poultry Growers, but who purchase or obtain the litter from non-party Growers or other sources (not Defendants). *See* Exs. 38-41.

25. The State of Oklahoma has land applied poultry litter in the IRW and has used poultry litter as a fertilizer on state-owned property within the IRW. *See* Ex. 42 at No. 169; *see also* Ford I Dep. at 68:13-16 (Ex. 43).

C. Releases of Phosphorus Compounds and Bacteria from State-Owned or State-Managed Lands to the Soils and Waters of the IRW

26. Phosphorus compounds and bacteria are present on real property owned by the

⁷ *See also* Dkt. No. 2055 at 3-4 ¶¶6-7, 15-16 (May 15, 2009); Dkt. No. 2033 at 3-4 ¶¶6-8, 18 (May 11, 2009).

State of Oklahoma within the IRW. *See* Ex. 42 at Nos. 183, 185, 187, 189, 191, 192, 193.

27. Storm water runoff (*i.e.*, rainwater runoff, snow melt runoff, and surface runoff and drainage) occurs from one or more parcels of real property owned by the State of Oklahoma within the IRW. *See* Ex. 42 at No. 181.

28. Ephemeral (seasonal) streams run through one or more parcels of real property owned by the State of Oklahoma within the IRW. *See* Ex. 42 at No. 180.

29. The IRW contains four state-owned or state-managed parks: Tenkiller State Park, Adair State Park, Cherokee Landing State Park, and Natural Falls State Park. These parks are managed by the Oklahoma Tourism and Recreation Department (“OTRD”), an agency of the State of Oklahoma. *See* Ex. 44 at 16-17.

30. Tenkiller State Park is located on Pine Cove Creek immediately adjacent to the eastern terminus of Tenkiller Ferry Dam on land leased by the State of Oklahoma from the United States Corps of Engineers. *See* Ex. 44 at 17; Ford I Dep. at 102:4-7 (Ex. 43).

31. In February 1977, the Oklahoma State Department of Health approved the use of effluent from human sewage wastewater lagoons for greenbelt irrigation along roadways to prevent sewage flows into Lake Tenkiller resulting from insufficient lagoon capacity. *See* Ex. 44 at 17; Ex. 45 at USACE-JD-012439 – USACE-JD-012440. Pursuant to the State’s authorization, human sewage wastewater has been applied to flora adjacent to roadways in the IRW for more than 30 years.

32. In August 1997, the ODEQ completed its final report concerning the potential for individual wastewater systems to impact the quality of the Illinois River. *See* Ex. 46. According to the report, Natural Falls State Park (formerly Dripping Springs) has a septic system, which is within 500 feet of the Dripping Springs branch. *See* Ex. 46 at ODEQ-117-0000318, ODEQ-117-

0000323; *see also* Pulliam Dep. at 25:19-25 (Ex. 47); Ex. 48. The same report indicates that many pit privies maintained by the Oklahoma Scenic River Commission are, with the exception of two, within 225 feet of the Illinois River or its tributaries. *See* Ex. 46 at ODEQ-117-0000325. The combined wastewater flow from these pit privies is 2,410 gpd (gallons per day). *See id.* at ODEQ-117-0000321.

33. In 1998, the U.S. Army Corps of Engineers (“Corps”) documented septic tank and pump-out facility overflows from Lake Tenkiller, which were regular occurrences for over 3 years. *See* Ex. 45 at USACE-JD-012432 – USACE-JD-012433.

34. In 1999, one of the human sewage wastewater retention lagoons at Tenkiller State Park was found to be leaking into the environment of the IRW. *See* Ex. 49; Ford I Dep. at 214:22-215:4 (Ex. 43).

35. In 1999, the OTRD and Oklahoma Department of Environmental Quality (“ODEQ”) entered into a Memorandum of Agreement designed to address pollution and human sewage management problems at Tenkiller State Park. In the Memorandum of Agreement, OTRD admitted to sewage overflows from a lift station and holding tank at Pine Cove Marina into Lake Tenkiller, unpermitted land application of effluent, and installing a holding tank containing raw sewage in a location that was periodically submerged by lake water during rising lake levels. *See* Ex. 50; Ford II Dep. at 140:18-141:2 (Ex. 51).

36. In December 2001, the State or its agents removed 258 dry tons of human sewage sludge from the lagoons at Tenkiller State Park during upgrades at the park and applied that sewage sludge to the “Neal Pack property” located just two miles east of the park and inside the IRW pursuant to a permit issued by ODEQ. *See* Ex. 44 at 18.

37. In June 2002, ODEQ issued an Administrative Compliance Order to the OTRD

for allowing sewage from Lake Tenkiller's holding tank and lift station and land application from the wastewater lagoon to discharge to groundwater and surface water. *See* 52 at ODEQ-068-0001654, ODEQ-068-0001663 – ODEQ-068-0001666.

38. In July 2004, a dike on one of the south lagoons broke and effluent flowed into a children's fishing pond and into Lake Tenkiller. *See* Williams Dep. at 47:14-49:20 (Ex. 53). Additionally, Lake Tenkiller State Park's management spray irrigated some of the water out of the lagoon in order to alleviate the discharge. *See id.* at 83:2-84:12.

39. On September 15, 2004, ODEQ amended the Tenkiller State Park Waste Water Treatment Plant's Sludge Management Permit, allowing Tenkiller State Park to land-apply human sewage sludge (known as biosolids) on site. *See* Ex. 54.

40. The State of Oklahoma has purchased and applied commercial fertilizer to lands within the IRW. *See* Ex. 42 at Nos. 175-76.

41. In 2008, the State of Oklahoma applied two tons of phosphorus-containing commercial fertilizer known as 9-23-30 to land at Cookson Wildlife Management Area in the IRW. The State applied this same amount of fertilizer at Cookson Wildlife Management Area in 2007. Since 1998, the State has applied phosphorus-containing commercial fertilizer to the land at Cookson Wildlife Management Area approximately five times. The State has also applied phosphorus-containing commercial fertilizer in similar quantities over a similar period of time at Cherokee Wildlife Management Area, which is also located within the IRW. *See* Ford II Dep. at 56:18-22, 159:6-22, 160:4-13 (Ex. 51).

42. The State of Oklahoma routinely applies 2,000 pounds of phosphorus-containing commercial fertilizer known as 4600 granular and 13-13-13 granular to approximately six acres of athletic fields on the campus of Northeastern Oklahoma State University, which is located in

the IRW. *See* Ford I Dep. at 171:9-172:1 (Ex. 43); Ford II Dep. at 109:2-6 (Ex. 51).

43. In April 2006, the State applied commercial fertilizer at Lake Tenkiller State Park at a rate of 100 pounds per acre. *See* Ford II Dep. at 134:7-15 (Ex. 51).

44. The State of Oklahoma granted leases for the grazing of cattle on the Cherokee Wildlife Management Area approximately twenty-five years ago. *See* Ex. 42 at No. 174.

45. Cattle manure contributes phosphorus compounds and bacteria to the environment of the IRW. *See* Ex. 42 at Nos. 69, 79.

46. The State of Oklahoma has constructed and maintained unpaved roads in the IRW, which has caused increased sediment in the streams of the IRW. *See* Ex. 42 at Nos. 200-201.

47. Oklahoma State University professor Michael Smolen estimates that unpaved roads could annually contribute as much as 200 tons of sediment per mile. *See* Smolen Dep. at 109:17-110:12 (Ex. 55).

48. Sediment from dirt or gravel contributes phosphorus compounds and nitrogen compounds to the surface waters of the IRW. *See* Ex. 42 at Nos. 203, 205.

D. Releases of Bacteria and Phosphorus Compounds in the IRW Permitted by Oklahoma

49. The State of Oklahoma has issued permits allowing for the discharge of phosphorus compounds and bacteria into the waters of the IRW. *See* Ex. 42 at No. 177.

50. The State of Oklahoma has issued discharge permits to the Tahlequah Public Works Authority (“TPWA”), City of Stilwell and Stilwell Area Development Authority (jointly “Stilwell”), and the Westville Utility Trust (“WUT”), which allow these entities to discharge wastewater containing phosphorus compounds and bacteria directly into the surface waters of the

IRW. *See* Ex. 56.⁸

51. Since 1998, TPWA has discharged an estimated average of 2,669 lb/yr of phosphorus compounds into Tahlequah Creek, which is within the IRW. *See* Ex. 44 at Tables 1 & 4.

52. Since 2001, Stilwell has discharged an estimated average of 2,414 lb/yr of phosphorus compounds into Caney Creek in Adair County, Oklahoma, which is within the IRW. *See id.*

53. Since 1999, WUT has discharged an estimated average of 937 lb/yr of phosphorus compounds into the Shell Branch Tributary of the Barren Fork river, which is within the IRW. *See id.*

E. Human Sewage Biosolids Applications to Soils in the IRW Permitted by Oklahoma

54. The State of Oklahoma has issued permits and promulgated regulations allowing for the land application in the IRW of human sewage biosolids containing phosphorus compounds and bacteria. *See* Ex. 42 at No. 178.

55. Between 1991 and 1997, 2,299.5 tons of human sewage biosolids from TPWA, containing 19.53 tons of phosphorus compounds and 4,170,000,000,000,000 (or 4.17 quadrillion, 4.17E+15) colony forming units of fecal coliforms, were land applied in the IRW pursuant to the State of Oklahoma's permits and regulations. *See* Ex. 44 at Tables 6 & 7.

56. Between 1993 and 1997, 1,431.5 tons of human sewage biosolids from Stilwell,

⁸ TPWA's discharge permit was first issued by the United States EPA to become effective in July 1974. Currently, TPWA's permit, issued by the State of Oklahoma, is effective through June 2010. *See* Ex. 44 at 7 and Table 1. Stilwell's discharge permit was first issued by the United States EPA to become effective in December 1974. Currently, Stilwell's permit is effective through 2013. *See* Ex. 44 at 10; Ex. 57 at 1. WUT's discharge permit was first issued by the EPA to become effective in July 1974. *See id.* Currently, WUT's permit, issued by the State of Oklahoma, is effective through June 2010. *See* Ex. 44 at 8 and Table 1.

containing 10.96 tons of phosphorus compounds and 2,600,000,000,000,000 (or 2.6 quadrillion, 2.60E+15) colony forming units of fecal coliforms, were land applied in the IRW pursuant to the State of Oklahoma's permits and regulations. *See id.*

57. Between 1992 and 2004, 87 tons of human sewage biosolids from WUT, containing 1.23 tons of phosphorus compounds and 158,000,000,000,000 (or 158 trillion, 1.58E+14) colony forming units of fecal coliforms, were land applied in the IRW pursuant to the State of Oklahoma's permits and regulations. *See id.*

LEGAL STANDARD

“Summary judgment ... is an important procedure ‘designed to secure the just, speedy and inexpensive determination of every action.’” *Culp v. Sifers*, 550 F. Supp. 2d 1276, 1281 (D. Kan. 2008) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). Summary judgment is appropriate where “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and ... the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The moving party is entitled to summary judgment as a matter of law where the non-moving party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322. Where the movant shows the “absence of a genuine issue of material fact, the non-movant may not rest on its pleadings but must set forth specific facts showing a genuine issue for trial as to those dispositive matters for which it carries the burden of proof.” *Sierra Club v. Seaboard Farms*, 387 F.3d 1167, 1169 (10th Cir. 2004); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (requiring non-moving party to provide admissible evidence “on which a jury could reasonably find for the plaintiff”); *Matsushita Elec. Indus. v. Zenith*, 475 U.S. 574, 586 (1986) (“[plaintiff] must do more than simply show that there is some metaphysical doubt as to the material facts”).

ARGUMENT

In this lawsuit, Plaintiffs are pursuing claims directed at a monolithic caricature they have concocted—the “poultry industry”—as opposed to the individual, separately owned and managed companies named as defendants. Plaintiffs’ claimed proof of “causation” does not differentiate between the individual Defendants and fails to make even a prima facie case of causation as to each of the named Defendants. Because Plaintiffs failed to meet their burden to come forward with proof that each Defendant was a cause of the alleged contamination from phosphorus compounds and bacteria in groundwater or recreational water bodies in the IRW, Plaintiffs’ state common law, federal common law nuisance, RCRA and CERCLA claims must be dismissed. In the alternative, even if Plaintiffs could satisfy their burden of proof on individual causation, their claims for joint and several liability under the common law of nuisance, trespass and unjust enrichment must be dismissed because the State of Oklahoma (whom Plaintiffs purport to represent) is a contributor to the harm alleged and Plaintiffs have not presented proof sufficient to apportion damages among the Defendants.

A. Counts 1, 2, 3, 4, 5, 6 & 10 Must be Dismissed Due to Plaintiffs’ Failure to Produce Evidence Demonstrating that Each Defendant has Caused Contamination of Public Waters

Causation is a necessary element of any tort claim, including the torts of nuisance, trespass and unjust enrichment. *See Twyman v. GHK Corp.*, 93 P.3d 51, 54 n. 4 (Okla. Civ. App. 2004); *Angell v. Polaris Prod. Corp.*, 280 Fed.Appx. 748, 2008 U.S. App. LEXIS 12007 (10th Cir. June 4, 2008) (affirming dismissal of public nuisance claim based on the plaintiff’s failure to satisfy causation element by offering proof that Defendant’s oil company—as distinct from co-defendants’ oil manufacturers or other sources—caused the contamination at issue); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 114 (Mo. 2007) (“substantial participation” standard in Restatement (Second) of Torts § 834 “does not abandon the requirement of proving

actual causation in a public nuisance claim”); PROSSER AND KEETON ON TORTS § 41 at 263 (5th ed. 1984). To establish causation in a tort claim, a plaintiff must prove that each defendant’s conduct was both the cause-in-fact⁹ and proximate cause¹⁰ of the alleged injury.¹¹ Here, Plaintiffs have failed to satisfy their burden to prove the first, and most basic, element of causation by neglecting to present evidence that each individual Defendant’s conduct constituted an ‘actual cause’ or ‘cause in fact’ of the alleged nuisance or trespass.

Causation requires a demonstrable link between a defendant’s conduct and the alleged injury. As the Supreme Court of Missouri recently explained:

In all tort cases, the plaintiff must prove that each defendant’s conduct was an actual cause, also known as cause-in-fact, of the plaintiff’s injury: Any attempt to find liability absent actual causation is an attempt to connect the defendant with an injury or event that the defendant had nothing to do with. Mere logic and common sense dictates that there be some causal relationship between the defendant’s conduct and the injury or event for which damages are sought.

City of St. Louis, 226 S.W.3d at 113-14 (rejecting a similar industry-wide nuisance claim) (internal quotations omitted). That Defendants all have poultry raised in the IRW or are otherwise similarly situated is beside the point; absent a defendant class, the law requires individualized proof of actual causation. *See id.* at 113-14.

The requirement for Plaintiffs to come forward with defendant-specific proof of actual causation also applies to their CERCLA and RCRA claims. On CERCLA, once an alleged

⁹ *See Okland Oil Co. v. Knight*, 92 Fed. Appx. 589, 598 (10th Cir. 2003); *McKellips v. St. Francis Hosp., Inc.*, 741 P.2d 467, 470 (Okla. 1987); *see also City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 113 (Mo. 2007); PROSSER AND KEETON ON TORTS § 41 at 266, 269.

¹⁰ *See Woolard v. JLG Indus.*, 210 F.3d 1158, 1172 (10th Cir. 2000); *Dirickson v. Mings*, 910 P.2d 1015, 1018-19 (Okla. 1996); PROSSER AND KEETON ON TORTS § 42.

¹¹ While Plaintiffs attempt to treat the Defendants on an industry-wide basis, it is important to recognize that the Court has not confirmed, nor has Plaintiff sought to confirm, a defendant class. *See Undisputed Facts* ¶1; *see also id.* at ¶¶2-8. Each element of liability must therefore be assessed against each Defendant individually.

contaminant is no longer in the immediate vicinity of the release site, questions of causation arise and it becomes necessary to determine whether a given release was a “substantial factor” in a plaintiff’s injury. *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1382, 1390 (W.D. Mo. 1994). This requirement “comports with the notions of fairness that have always been present with questions of causation in our legal system.” *Id.* Accordingly, “where multiple sites may be responsible for releases causing the contamination and that contamination resulted in response costs being incurred, plaintiffs must provide evidence that the contamination resulted from a release from defendant’s site.” *Kelley v. Kysor Industrial Corp.*, 1994 U.S. Dist. LEXIS 21194, *28-29, Case No. 5:91-CV-45 (W.D. Mich. Oct. 27, 1994); *see also New Jersey Turnpike Auth. v. PPG Indus., Inc.*, 197 F.3d 96, 105 (3d Cir. 1999) (overbroad CERCLA “facility” not limited to specific releases “would result in an unwarranted relaxation of the ‘nexus’ required” to show that each defendant caused the alleged contamination); *United States v. Iron Mtn. Mines, Inc.*, 987 F. Supp. 1263, 1270 (E.D. Cal. 1997) (rejecting overbroad CERCLA facility because such a definition would “flounder on the minimal causation requirement in CERCLA”); *see also* Dkt. No. 1872 at 21-24 (Feb. 18, 2009); Dkt. No. 1925 at 8-10 (Mar. 23, 2009). Similarly, RCRA requires that the plaintiff demonstrate that the defendant against whom an injunction is sought has “discarded” what RCRA defines as “solid waste” or “hazardous waste” and that the defendant’s solid or hazardous waste is causing an imminent and substantial endangerment to human health or the environment. 42 U.S.C. § 6972(a)(1)(B); *see Attorney General of the State of Oklahoma v. Tyson Foods*, No. 08-5154, Slip Op. at 10-15 (10th Cir. May 13, 2009); *Opinion and Order*, Dkt. No. 1765 at 7 (Sept. 29, 2008) (Frizzel, J.). RCRA’s causal requirement has been the subject of extensive briefing in this case, including a pending motion for summary judgment on Plaintiffs’ RCRA claim. *See* Dkt. No. 2050 at 19-21 (May 14, 2009).

Despite ample time and opportunity, Plaintiffs have failed to submit evidence linking each particular Defendant's conduct to any alleged injury purportedly caused by the land application of poultry litter. *See* Undisputed Facts ¶¶14-18; Joint Appendix at ¶¶ I.(A)-(D), III.(A); IV.(B)-(C); V.(B)-(D).

Plaintiffs' claims of causation rely principally on the testimony of Valarie Harwood and Roger Olsen, who claim that their chemical and biological "fingerprinting" work allows them to link particular bacteria and phosphorus compounds to poultry litter. They purport to be able to do so despite the fact that the bacteria and nutrients they claim to be able to link back to poultry litter flow from many sources in the IRW and are ubiquitous in the environment. The Court was appropriately skeptical of this testimony previously and found it to be unreliable under the *Daubert* test, *see Opinion and Order*, Dkt. No. 1765 at 6-7 (Sept. 29, 2008) (Frizzel, J.), a decision the Tenth Circuit has now unanimously affirmed, *see Attorney General of the State of Oklahoma v. Tyson Foods*, No. 08-5154, Slip Op. at 15-21 (10th Cir. May 13, 2009). As explained in Defendants' motions to exclude their testimony pursuant to *Daubert*, their work is novel, has not been published (Olsen) or has failed peer review (Harwood), and is fraught with error. *See* Dkt. No. 2028 (May 8, 2009) (Harwood *Daubert* Motion); Dkt. ____ (May 18, 2009) (Olsen *Daubert* Motion). Other than this fingerprinting work, Plaintiffs did not undertake a fate-and-transport study to track the alleged movement of bacteria and phosphorus compounds from each field where poultry litter was applied to the recreational streams of the IRW, Lake Tenkiller and groundwater.¹² *See* Dkt. No. 2028 at 10-12 (May 8, 2009) (Harwood *Daubert* Motion); Dkt.

¹² *See Attorney General of the State of Oklahoma v. Tyson Foods*, No. 08-5154, Slip Op. at 14 (10th Cir. May 13, 2009) ("Oklahoma failed to conduct a fate and transport study to establish that any surviving bacteria from poultry litter actually reached the waters of the IRW."); P.I.T. at 764:9-12, 775:15-18 (Dr. Harwood did not conduct a fate and transport analysis) (Ex. 31); Harwood Dep. at 9:9-13 (Ex. 26) (same); P.I.T. at 301:21-302:10, 336:22-337:1; 337:24-338:6

No. ___ at ___ (May 18, 2009) (Olsen *Daubert* Motion); *Hatco Corp. v. W.R. Grace & Co.-Conn.*, 836 F. Supp. 1049, 1060-61 (D. N.J. 1993) (describing proper fate and transport analysis); *City of Wichita v. Trustees of APCO Oil Corp. Liquidating Trust*, 306 F. Supp. 2d 1040, 1109-10 (D. Kan. 2003) (rejecting as unreliable groundwater modeling developed in part by Roger Olsen because it failed to account for typical fate and transport considerations). These waters may be miles away from any particular field. Moreover, Plaintiffs acknowledge that phosphorus compounds and bacteria come from a wide variety of human and animal sources. *See* Dkt. No. ___ at ___ (May 18, 2009) (Olsen *Daubert* Motion); *see also Attorney General of the State of Oklahoma v. Tyson Foods*, No. 08-5154, Slip Op. at 13 (10th Cir. May 13, 2009). Accordingly, when Plaintiffs find phosphorus compounds or bacteria in the waters of the IRW, they have no idea (in the absence of Drs. Harwood and Olsen’s novel “biomarkers”) whether those phosphorus compounds and bacteria came from poultry litter or some other source. *See, e.g., id.* at 11-15; *Opinion and Order*, Dkt. No. 1765 at 6-7 (Sept. 29, 2008) (Frizzel, J.). Plaintiffs’ claims must therefore fail for lack of proof of causation. *See supra* at 16-18.

However, for purposes of this motion it is important to note that these claims would fail as a matter of law *even if* Plaintiffs’ “biomarker” evidence was admissible under *Daubert*. Plaintiffs’ “fingerprinting” only attempted to establish a link between “poultry waste” in general and Plaintiffs’ alleged injuries. Plaintiffs’ experts admit that they did not even attempt to establish causation on a defendant-by-defendant basis. *See* Undisputed Facts ¶¶14-18; Joint Appendix at ¶¶ I.(A)-(D), III.(A); IV.(B)-(C); V.(B)-(D). Accordingly, even if taken as true,

(Dr. Teaf did not conduct a formal fate and transport analysis) (Ex. 31); *id.* at 453:17-20 (Dr. Fisher did not conduct a fate and transport analysis of bacteria); Olsen I Dep. at 25:21-26; 318:21-319:6 (Dr. Olsen not asked to track movement of litter constituents from particular land-application sites to allegedly contaminated waters or sediments) (Ex. 58); Macbeth Dep. at 84:22-25, 86:21-87:2 (Ex. 59).

Plaintiffs' fingerprinting work only establishes that water touched litter from some chicken or turkey or that bacteria originated from a chicken or a turkey. Plaintiffs have no evidence to demonstrate that the phosphorus compounds or bacteria they have identified came from poultry belonging to any particular Defendant. Because Plaintiffs have failed to offer any evidence linking any particular Defendant to the alleged injuries in this case, their nuisance, trespass, RCRA and CERCLA causes of action against all Defendants must be dismissed.

B. In the Alternative, the Poultry Defendants Cannot be Jointly and Severally Liable For Nuisance, Trespass or Unjust Enrichment (Counts 4, 6 & 10) Because the State of Oklahoma Is a Contributor to the Alleged "Contamination"

Oklahoma law is well settled on the applicability of joint and several liability. Generally, tortfeasors are considered joint tortfeasors when there is some concerted action on their part causing injury, or when there is some common purpose or design in their actions. *See Kirkpatrick v. Chrysler Corp.*, 920 P.2d 122, 126 (Okla. 1996) (citing *Hammond v. Kansas, O & G Ry. Co.*, 234 P. 731 (Okla. 1925)). In a situation where tortfeasors act in concert they are each liable for the entire result or damage done. *See id.* (citing W. Prosser, *Handbook of the Law of Torts*, Ch. 8 § 46, at 291 (4th ed. 1971)). In this case, Plaintiffs have not alleged and the evidence simply will not support any argument that Defendants acted in "concert" to cause the harm alleged. The Defendants are fierce competitors, particularly so in matters relating to the raising of poultry. *See Undisputed Facts* ¶¶2-9.

In the absence of a concert of action, joint and several liability may still apply where the harm suffered is "indivisible" and the defendants are "concurrent tortfeasors." *Northup v. Eakes*, 178 P. 266, 268 (Okla. 1919). Tortfeasors are classified as concurrent tortfeasors when, despite the absence of concert of action, their independent acts concur or combine to produce a single or indivisible injury. *See Kirkpatrick*, 920 P.2d at 126 (citing *Brigance v. Velvet Dove Restaurant*,

756 P.2d 1232 (Okla. 1998)).¹³ Under Oklahoma law, concurrent tortfeasors, like joint tortfeasors, may each be held liable for the entire harm. *Kirkpatrick*, 920 P.2d at 126 (citing *Brigance v. Velvet Dove*, 756 P.2d 1232, 1233; *Boyles*, 619 P.2d at 617; *All Am. Bus Lines v. Saxon*, 172 P.2d 424, 429 (Okla. 1946)). In other words, when an indivisible injury is present, a plaintiff generally is not required to apportion damages even though he or she may be unable to establish the concert of action typically required for joint and several liability.

Under this “indivisible harm” or “concurrent tortfeasor” theory, a plaintiff must show that each defendant (1) has performed an act and (2) that act has combined with the acts of the other defendants to produce a single or indivisible injury. *Northup*, 178 P. at 268. However, this method of obtaining joint and several liability is unavailable to any plaintiff who has also contributed to the alleged “indivisible harm.” In that instance, there is no perceived injustice of requiring that the plaintiff either be prepared to apportion damages or prove concert of action among the Defendants. Therefore, where, as here, the plaintiff has contributed to its own injury, the indivisible injury theory does not apply to make available joint and several liability. *See Walters v. Prairie Oil & Gas Co.*, 204 P. 906, 908 (Okla. 1922).

Walters v. Prairie Oil & Gas Co. is controlling, and stands for the specific proposition that the indivisible harm theory is *not* available to a plaintiff who has also contributed to the pollution alleged. In *Walters*, a riparian landowner sued jointly and severally a group of separate

¹³ Fundamental to any assertion that the conduct of the individual Defendants has “combined” to produce an “indivisible harm” (*i.e.*, that Defendants are concurrent tortfeasors) is a demonstration that the conduct of each Defendant contributed to the harm alleged. As stated above, Plaintiffs simply cannot present facts sufficient to prove the essential element of specific causation that is necessary to trigger application of the “indivisible harm” theory. Plaintiffs have not shown, nor will they be able to show, a sufficient causal link between the harm alleged and the acts of each Defendant or a Contract Grower operating under contract with any Defendant. *See* Undisputed Facts ¶¶14-18. Without Plaintiffs’ showing such a causal link, the single or indivisible harm theory does not apply to make joint and several liability available to Plaintiffs in this case.

leaseholders located upstream for damages for pollution of a stream. *See id.* at 907. Part of the damage to the stream was occasioned by the defendants and part of the damage was caused by a tenant of plaintiff either with the consent of plaintiff or as a result of the ordinary use of property by tenant. *See id.* The Supreme Court of Oklahoma rejected the plaintiff's joint and several liability claim because "the evidence shows that part of the damage inflicted was occasioned by the defendants and part by a tenant of the plaintiff, not a party to the action, either with the plaintiff's consent or as the result of the ordinary use of the premises by the tenant" *Id.* at 908. The court explained that "to permit recovery in these circumstances would be to allow the plaintiffs to mulct the defendants in damages not only for their own acts, but for the acts of plaintiffs' tenant." *Id.*¹⁴

Walters squarely aligns with this case. Plaintiffs allege that Defendants have caused indivisible "pollution of and injury to the IRW" because non-party farmers and ranchers, many of which are unaffiliated with any Defendant, have used poultry litter as a fertilizer in accordance with state-approved management plans. SAC ¶¶29; *see* Undisputed Facts ¶¶19-24. But it is clear that Plaintiff State of Oklahoma has itself discharged materials containing phosphorus compounds and bacteria into the soils and waters of the IRW, including directly into Lake Tenkiller.¹⁵ *See* Undisputed Facts ¶¶25-57. The State of Oklahoma has discharged into the soils and waters of the IRW the very same nutrients, "pollutants," and "hazardous substances" that it

¹⁴ The Supreme Court of Oklahoma's decision in *Walters* that joint and several liability under an indivisible harm theory is not available to a plaintiff who contributes to the harm has been repeatedly reaffirmed. *See H.F. Wilcox Oil & Gas Co. v. Johnson*, 86 P.2d 51, 54 (1939) ("[t]he *Walters* case holds that the plaintiff could not recover because plaintiff consented to and actively participated in the pollution of the stream by the plaintiffs' own tenant, which pollution, together with that caused by defendants, caused the damage"); *see also British-American Oil Producing Co. v. McClain*, 126 P.2d 530, 532 (1942) (citing approvingly the holding in *Walters*).

¹⁵ Importantly, in *Walters*, the court prohibited a plaintiff from recovering because of the actions of the plaintiffs' tenant. *See Walters*, 204 P. at 907-08. In the matter before this Court, the actions precluding joint and several liability are those of Plaintiff State of Oklahoma itself.

alleges Defendants have discharged. *See id.* at ¶¶25-57. The State has engaged in conduct resulting in such contamination on a far broader scale than the allegations against Defendants—through direct contributions to the discharge or release of phosphorus compounds, nitrogen and bacteria into the soils and waters of the IRW, *see id.* at ¶¶25-48, and through its regulatory role in which it permits others to discharge or release such substances into the IRW, *see id.* at ¶¶49-57. Plaintiffs’ allegations with respect to Defendants focus solely on the land application of poultry litter, an activity sanctioned by the Oklahoma legislature and regulated by Oklahoma agencies. *See id.* at 19-21. In comparison, not only has the State itself applied phosphorus compounds to land within the IRW through its use of poultry litter and commercial fertilizer,¹⁶ it has also built and maintained structures for the storage and handling of human sewage and wastewater that are insufficient to protect the environment. Such structures, located on land owned or managed by the State of Oklahoma, have permitted human sewage and wastewater to enter the environment of the IRW. *See, e.g.,* Undisputed Facts ¶¶31-39. Additionally, the State of Oklahoma has admitted that it has intentionally land-applied lagoon effluent and human sewage biosolids within the IRW, *see, e.g.,* Undisputed Facts ¶¶31, 39, and has further issued permits to various municipalities allowing the same conduct on a much larger scale, *see, e.g.,* Undisputed Facts ¶¶54-57. The State has also issued permits to municipalities allowing discharge of treated wastewater, which contains phosphorus compounds, directly into the waters of the IRW (unlike poultry litter, which is applied to the soil and not directly into the streams of the IRW). *See* Undisputed Facts ¶¶49-53. Through these activities, Plaintiffs have, as a matter of law, contributed to the injuries and damages for which they now seek to impose liability on Defendants.

¹⁶ Commercial fertilizer is a source of phosphorus and other nutrients, just like poultry litter. *See* Dkt. No. 1925 at 4, Ex. A ¶2 & Ex. D (Mar. 23, 2009); Undisputed Facts ¶¶40-43.

Plaintiffs' numerous and systematic contributions to the alleged injuries of which they complain render the "indivisible harm" theory inapplicable to this case. Accordingly, joint and several liability is not available to Plaintiffs, and this Court should enter judgment as a matter of law that Plaintiffs are not entitled to joint and several liability for their state law claims.

CONCLUSION

For the foregoing reasons, the Court should dismiss Counts 1, 2, 3, 4, 5, 6 and 10 of the Second Amended Complaint because Plaintiffs have failed to put forth evidence of causation on the part of each of Defendants individually. Alternatively, even if the Court were to conclude that Plaintiffs have met their burden to prove causation with respect to each Defendant, the Court should dismiss Plaintiffs' claims for joint and several liability with respect to their state common law claims of nuisance, trespass and unjust enrichment (Counts 4, 6 and 10).

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CERTIFICATE OF SERVICE

I certify that on the 18th day of May 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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